STATE OF MICHIGAN

COURT OF APPEALS

HAMILTON'S HENRY THE VIII LOUNGE, INC.,	UNPUBLISHED May 18, 2006
Petitioner-Appellee,	
v	No. 255893 Wayne Circuit Court LC No. 03-312904-AV
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES and LIQUOR CONTROL COMMISSION,	
Respondents-Appellants.	

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Respondents appeal by delayed leave granted from a circuit court order reversing a liquor license violation order issued by respondent Michigan Liquor Control Commission ("LCC"). We reverse.

This case arises from the Inkster Police Department's investigation of an alleged bomb threat at the Henry VIII Lounge (the "bar"), an establishment owned by petitioner and licensed to serve alcohol. After searching the premises and finding no bomb, Officer Kenneth Brown took the bar's surveillance videotape, purportedly to see who placed the phone call reporting the bomb threat. The videotape did not depict anyone placing the phone call, but allegedly showed topless dancers performing lap dances for the bar's patrons, and engaging in simulated sexual activity and prohibited nudity in violation of LCC regulations that prohibit such activity on premises licensed to serve liquor.

Officer Brown did not log the videotape into the police department's evidence log. He stated in an incident report that he did not find any evidence on the videotape, and he inaccurately indicated that he returned the videotape to the bar when, in fact, he kept it in his desk. Officer Paul Martin later removed the videotape from Brown's desk, and turned it over to the LCC which charged petitioner with five violations of Rule 436.1411(1) (licensee may not allow upon licensed premises a person who performs or simulates performance of sexual act), and two violations of Rule 436.1409(1) (licensee may not allow upon licensed premises a person who exposes pubic region, anus, or genitals).

Petitioner moved for the LCC commissioner to suppress the videotape, arguing that the police acted in collusion with the LCC to stage a fake bomb threat as a pretext for conducting an illegal warrantless seizure. The commissioner found that the videotape was taken legally, with petitioner's consent, but also stated that even if it had been illegally seized, it would still be admissible pursuant to our Supreme Court's decision in *Kivela v Dep't of Treasury*, 449 Mich 220; 536 NW2d 498 (1995). The Department of Consumer and Industry Services's Appeal Board upheld the LCC's order, and petitioner appealed to the circuit court.

The circuit court agreed to hold an evidentiary hearing to expand the record concerning whether the LCC and the Inkster police acted in collusion in seizing the tape. Conflicting testimony was presented concerning the circumstances under which the videotape was seized.

Petitioner's witnesses testified that Brown took or received keys from the bar's manager and then went to the manager's office alone to retrieve the videotape from the recording machine, over the protests of the manager and her supervisor. The officers testified that the manager accompanied Brown to the office to remove the videotape, and did not object to him taking it. The officers acknowledged, however, that the videotape showed the manager being escorted outside the bar just before the videotape was removed from the machine.

The circuit court found that the officers' testimony was not credible and that the videotape was illegally seized, without petitioner's consent. Additionally, the court rejected respondents' arguments that the videotape could still be admitted in an independent civil proceeding, even if it was illegally seized, concluding that the "obvious result [of taking the videotape] would be to assist civil law enforcement authorities." Accordingly, the circuit court set aside the LCC's order.

Ordinarily, a circuit court's review of a final agency determination is limited to the record, and the circuit court must defer to the agency's findings of facts. See *Michigan Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 123-124; 223 NW2d 283 (1974); *Northwestern Nat'l Casualty Co v Comm'r of Ins*, 231 Mich App 483, 496; 586 NW2d 563 (1998). Here, however, the circuit court determined that it was necessary to expand the record and it conducted its own evidentiary hearing. Although respondent objected to this procedure below, on appeal the parties do not raise any issue challenging the circuit court's authority in this regard.

In *Kivela, supra* at 220, our Supreme Court considered the admissibility of illegally seized evidence in a civil proceeding. Police officers assigned to an interdepartmental narcotics investigation unit had executed a search warrant in the petitioner's home and found financial records documenting the sales and purchases of narcotics. *Id.* at 222-223. A court subsequently determined that the search warrant was invalid because it was not supported by probable cause, and dismissed criminal charges against the petitioner. *Id.* at 223. Meanwhile, the petitioner's financial records were turned over to the Department of Treasury, which assessed unpaid taxes, penalties, and interests against the petitioner on the basis of the illegally seized records. *Id.* The petitioner argued that the evidence should be suppressed because they were illegally seized. *Id.* at 223-224. The Tax Tribunal determined that the evidence was admissible. *Id.* at 224.

The Supreme Court agreed with the Tax Tribunal, noting that federal law permitted financial records seized pursuant to an invalid search warrant to be used as evidence in a civil tax assessment proceeding by another sovereign. *Id.* at 224-225. The Supreme Court relied on *Wolf v Comm'r of Internal Revenue*, 13 F3d 189 (CA 6, 1993), which formulated a five-pronged balancing test to determine whether the exclusionary rule applies to civil tax proceedings. These factors are:

> 1. The nature of the proceeding;
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> 2. Whether the proposed use of unconstitutionally seized material is intersovereign or intrasovereign;
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> 3. Whether the search and the second proceeding are initiated by the same agency;
>
> 4. Absent an explicit and demonstrable understanding between the two agencies, whether there is statutory regime in which both agencies share resources, particularly resources derived from one of the proceedings; and
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> 5. The relationship between the law enforcement responsibilities and expertise of the seizing officials and the type of proceeding at which the seized material is being offered. [*Kivela, supra* at 228-229.]

The Court rejected the petitioner's argument that the Michigan Constitution provides greater protection against illegal searches and seizures than the United States Constitution. *Id.* at 234-235. The Court concluded:

> Because there is no evidence of bad faith, collusion between agencies, or unethical behavior on the part of the law enforcement agents, allowing the evidence to be admitted in the civil tax proceeding will affect neither the deterrence of the exclusionary rule nor allow an increase in the use of criminal cases as a mere pretext for civil cases. Evidence unlawfully secured by criminal law enforcement agents with the intent to unethically and illegally assist civil law enforcement authorities is not admissible. [*Id.* at 236.]

Applying the five factors in *Wolf* to the case before it, the Court determined that the jeopardy tax proceeding was not a "quasi-criminal" proceeding, because the proceeding enforced a tax obligation that applied to all citizens. *Id.* at 237-238. It additionally found that the proceedings were intrasovereign, because the police agency and the Department of Treasury were both agencies of the state. However, it also found that this factor was insufficient to find a close relationship between them for the purposes of the search and the secondary proceedings. *Id.* at 238. With respect to the third factor, the Court found it "abundantly clear that the criminal and tax proceedings were instituted by different agencies," a factor which "most definitely weighs against applying the exclusionary rule in this case." *Id.* at 238. With respect to the last two factors, the Court stated:

> The last two prongs of the *Wolf* test require this Court to determine whether there was an "explicit and demonstrable understanding" between the two agencies involved in the case, and examine the relationship between the seizing officials and "zone of interest" of the seizing officials. The dissent argues that the record "reveal[s] curious facts" and argues that "this case reveal[s] a nexus that is simply too close for comfort. . . ." CAVANAGH, J., *post* at 259, 260. However, the dissent acknowledges that there is "no specific proof of cooperation or collusion" in this case. *Id.* at 258.
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> In the absence of more than "curious facts" and agreeing with the dissent that there is no direct evidence of bad faith, collusion between the agencies, or unethical behavior on the part of the law enforcement agents, we conclude that the Court of Appeals incorrectly found that evidence seized in an improper police search may not be used as the basis of an independent civil jeopardy tax assessment proceeding. Accordingly, we reverse the decision of the Court of Appeals and reinstate the order of the Tax Tribunal. [*Id.* at 239.]

Applying *Kivela* to this case, we conclude that the circuit court erred in determining that the videotape was not admissible in the proceedings before the LCC. Initially, we note that the circuit court never explicitly found evidence of collusion. Rather, the court found that Officer Brown falsely testified that the bar's manager removed the videotape for him, and falsely stated in his report that he returned the videotape. The court concluded that "the tape was knowingly taken in violation of the constitution, and that the obvious result would be to assist civil law enforcement authorities."

The central principle in *Kivela* is that an unlawful seizure does not render evidence inadmissible in a civil proceeding *unless* there is also evidence of collusion. This query entails examination of the nature of the civil proceeding, the intrasovereign or intersovereign use of the evidence, and other aspects of the relationship between the agency conducting the search and the agency conducting the secondary proceeding. The circuit court did not examine these factors, or identify evidence of collusion, but merely belied that it was "obvious" that the "result" of Officer Brown's unlawful seizure would lead to civil license violation proceedings. When the evidence is examined in light of the *Kivela* Court's five factors, it is insufficient to establish collusion.

The first factor, nature of the proceeding, considers whether the secondary proceeding is "quasi-criminal." *Kivela, supra* at 237. Although there is little law defining the nature of a liquor license violation proceeding, even if it is viewed as quasi-criminal, that is insufficient to require that the seizure of the tape, if illegal, be excluded from the proceeding. The second factor, whether the proceedings are intersovereign or intrasovereign, weighs in petitioner's favor. Both the Inkster Police Department and the LCC are agencies of the state. *Kivela* at 238. However, this factor alone is insufficient to establish collusion. *Id.*

The third factor weighs against petitioner, because the LCC and the Inkster Police Department are two separate agencies. Petitioner's contention that Officer Martin was the Inkster Police's LCC officer is not entirely accurate. Martin testified that the Inkster Police Department does not have an officer who specializes in liquor control violations, that he was not formally assigned as a liquor control officer, but that he handled "all of those cases." However, there is no indication in the record how many of "those cases" there were or how much of

Officer Martin's time on the job was taken up with them. The mere fact that Martin might be called upon to investigate liquor control violations from time to time does not establish any significant overlap between the two agencies, nor does it establish collusion in this particular instance.

The fourth factor, existence of a "statutory regime in which both agencies share resources," also weighs against petitioner. MCL 436.1543 provides that 55 percent of the proceeds from retailers' license fees and renewal fees are paid to the municipality to cover the cost of law enforcement. However, the fourth factor emphasizes shared resources that are "derived from one of the proceedings." Section 1543 does not provide for payment of any portion of fines assessed against violators to the municipality, and thus does not give law enforcement agencies any financial incentive to identify violations.

Finally, the fifth factor also weighs against petitioner. There is no relationship between the law enforcement responsibilities and expertise of the seizing officers and the type of proceeding at which the seized material is offered. *Kivela*, *supra* at 229. Officers do not require any special expertise or training to recognize violations of LCC rules prohibiting nudity and simulation of sexual activity.

The *Kivela* Court treated the fourth and fifth factors as a general query of "whether there was an explicit and demonstrable understanding between the two agencies involved in the case," and a general examination of "the relationship between the seizing officials and zone of interest of the seizing officials." *Id.* at 239 (citations and internal quotations omitted). This application of the last two factors weighs against petitioner. There was no evidence of any understanding between the Inkster Police Department and the LCC with respect to investigating violations in the bar. Petitioner failed to show that anyone from the LCC even knew anything about the officers' investigation of the bar until Martin turned over the videotape. There also is no evidence of any conjoint activity between the police and the LCC with respect to the videotape before Martin logged in the videotape as evidence and reported the matter to the LCC.

It is important to note that § 436.1217(2) permits the officers to seize evidence of a violation for use in an administrative or court proceeding. Therefore, the officers could have seized the videotape under this statutory provision if they knew it depicted impermissible activity.

We hold that the circuit court erred in determining that the videotape was not admissible in the liquor license violation proceeding and setting aside the LCC's findings and order on that basis. Accordingly, the LCC's findings and order shall be reinstated.

Reversed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Brian K. Zahra